

Paul Todd

E-Commerce Law



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Paul Todd

Reader in Law,
University of Wales Swansea

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PREFACE

This is a textbook on the law of e-commerce, intended primarily for students of law, or of schemes of study where law is an element, whether at undergraduate or postgraduate level. I teach e-commerce law, at undergraduate and postgraduate level, to students of law, business management and information technology, and I hope this book will be of use, at the very least, to my own students.

E-commerce is still a fairly new phenomenon, at least as we know it today, and when a new phenomenon arrives, the existing law has to apply to it as best it can. Often it does not apply very well, but there are still a number of areas where there is no legislation specifically to deal with e-commerce and the pre-existing law continues to apply. Sometimes the pre-existing law is statutory, as for example with trade marks, discussed in Chapter 3, but quite large areas remain covered only by common law. There is therefore quite a bit of material for case lawyers here, especially in the sections on contract formation, incorporation of terms, etc.

Yet though e-commerce as a phenomenon remains fairly new, the law is maturing and there has already been some development to deal with the new phenomenon; there is now quite a bit of legislation aimed at e-commerce in particular. Much of this legislation has EU origins, and is aimed at (at least) partial harmonisation of the law throughout the EU. All law students will know that the skills involved in interpreting EU legislation and cases are very different from those involved in studying domestic UK law.

Another consequence of e-commerce law having developed to a stage at least slightly above the embryonic is that there is less need to rely on cases from the US and other jurisdictions; for the most part, there is enough material from the UK and EU for us to be able, with reasonable certainty, to state the law on the basis of that material alone. There are some areas, however, for example ISP liability in Chapter 12, where reform is being actively considered. In such areas, cases and legislation from the US and elsewhere are discussed, not so much to help determine what the law is in the UK, but by way of comparison, since other jurisdictions may have desirable features, which the UK might consider adopting.

It is also clear that e-commerce practices and techniques continue to develop, and indeed to develop quickly, and the law should ideally continue to react to these new developments. A good example is the discussion in Chapter 4 of deep linking and peer-to-peer distribution systems, where technology has developed to assist copyright holders, and the focus of the law has moved from copyright infringement itself to protecting the technological devices used to protect the copyright. No doubt we can expect to see other changes in focus in other areas of e-commerce law over the next few years.

On an issue of language convention, many of the actors in this book are companies. A company has legal personality, and therefore cannot be 'it', but there are not two types, so 'he or she' would also be entirely inappropriate. A company is therefore 'he', in line with what I take to be conventional English usage, just as conventionally (I think), ships and countries are female. Nothing should be read into these conventions, any more than into the convention in French that a cat is male and a car is female – it is just language convention.

The law is stated as at 31 January 2005.

Paul Todd



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PART 1

INTRODUCTION



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INTRODUCTION

1.1 WHAT IS E-COMMERCE?

1.1.1 The medium

At the core of e-commerce is the Internet, but it is certainly possible to define the activity more widely than this. The following, for example, is taken from a description of the role in e-commerce of the World Trade Organisation (WTO):¹

... electronic commerce is broadly defined as referring to six instruments, namely: 'the telephone, the fax, television, electronic payment and money transfer systems, Electronic Data Interchange and the Internet.'

Another example of a wide definition of e-commerce is:²

Any business transaction concerning goods and services, where participants are not in the same physical location and communicate through electronic means.

It can be seen that these definitions include, for example, contracting over the telephone, or by telex or fax. However, these do not raise issues which differ from any other kind of contract and, therefore, I do not propose to cover them in this book. Definitions can in any case vary, depending on the use to which they will be put. If a wide role is argued for the WTO, then a wide definition of e-commerce may well be appropriate. Conversely, the United Nations Commission on International Trade (UNCITRAL) refers to e-commerce as involving 'the use of alternatives to paper-based methods of communication and storage of information'.³ This clearly excludes communicating by telex or fax and, indeed, as we will see, the EU concept of the Information Society is confined to communications and transactions that take place online.⁴

It is clear, then, that there are no generally accepted definitions of e-commerce. For the purposes of this book, it seems sensible to exclude anything that does not raise special issues that are particular to e-commerce. My own working definition, therefore, is narrow, as follows:

Any transaction involving goods or services where digital electronic communication performs an essential function.

This is a commercial law book, so we shall also assume the existence of a commercial party, at least on one side of the transaction. The other party may also be a commercial party ('B2B e-commerce'), or a consumer ('B2C e-commerce').

1 Barchetta, M, Low, P, Mattoo, A, Schuknecht, L, Wager, H and Wehrens, M, *Electronic Commerce and the Role of the WTO*, 1998, Geneva: World Trade Organisation, p 5, quoted by Brownsword, R and Howells, G, 'When surfers start to shop: Internet commerce and contract law' (1999) 19 LS 287, p 288, note 1.

2 Lodder, A and Kaspersen, H (eds), *eDirectives: Guide to European Union Law on E-Commerce*, 2002, The Hague: Kluwer Law International, p 3.

3 Preamble to UNCITRAL's *Model Law on Electronic Commerce* (1996), referred to in Lodder and Kaspersen, *ibid*, p 3. UNCITRAL's English frame is at www.uncitral.org/en-index.htm (then link to adopted texts and e-commerce).

4 See the E-commerce Directive, discussed in section 10.1.5.

The reference to digital communication is intended to exclude telephone conversations (since these are often analogue) and, for the same reason, telex and fax communications. It is not confined to Internet communications, however. In principle, this definition could include short message service (SMS) and local area network (LAN) communications and any other connection between computers. It also includes commerce within a closed electronic system, such as CompuServe, and also electronic data interchange (EDI) systems between businesses. All these raise issues which are peculiar to the method of communication. Future developments are also covered, insofar as they can be predicted – for example, the use of television and mobile phones, the last of which, in particular, may give rise to interesting issues.

To this extent, therefore, e-commerce law is wider than Internet law. In practice, of course, e-commerce will nearly always involve the Internet, at least part of the communication being either by e-mail or the World Wide Web, and to this extent there is an overlap between the two fields. E-commerce is narrower than Internet law, however, in that we are concerned only with commercial activity, and not (except peripherally) with criminal issues, such as pornography. Defamation is covered, however, because it can arise in a commercial context (for example, electronic newspapers), and also because much of the material on ISP liability, considered in Chapter 12, relates to defamation.

1.1.2 The transactions

There is no doubt that the real impetus to e-commerce has been the development, since about 1994, of the World Wide Web (WWW). Certainly, this was the impetus for the consumer-based e-commerce, around which quite a large proportion of this book is based. However, e-commerce includes more than just the obvious example of Internet shopping. Commercial activity includes not only sales, but also matters such as advertising and the provision of information (price lists, timetables, etc) to assist a commercial transaction. E-commerce includes reading an e-newspaper like the *Shetland Times* (on which there is a well known case, considered in Chapter 4 of this book),⁵ the purchase of information products such as music, or database information such as LexisNexis or Westlaw.⁶ Some of these activities are impossible in the paper-based world.

Ultimately, however, this book is concerned with commercial transactions, involving goods or services, including the provision of online services, and delivery of electronic goods.⁷ Transactions can be purely commercial, between businesses, for example with EDI, or can involve consumers, dealing either with businesses or with other consumers. The book is also concerned with the support infrastructure for electronic trading, for example the allocation of domain names for business websites.

5 Section 4.4.3.

6 The legal databases respectively of Butterworths and Sweet & Maxwell.

7 This may not be the same as goods and services as defined in UK statute law. Indeed, the classification of these contracts itself raises issues: see further the discussion in section 10.1.1. There are also taxation implications, which are beyond the scope of this book, but see Basu, S, 'To tax or not to tax? That is the question? Overview of options in consumption taxation of e-commerce' at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/basu.

1.2 SOME FEATURES OF THE INTERNET AND THE WWW

However e-commerce is defined, most of it is currently Internet-based⁸ and, as we will see, it has been transformed by the emergence as a major force, in the mid-1990s, of the WWW. It is impossible to understand e-commerce law without at least some understanding of how it all works and, since most e-commerce is Internet-based, how the Internet works; some of the unique features of the Internet need to be grasped.

There was no inevitability about e-commerce being Internet-based, and indeed books on electronic data interchange, written around 1990, assumed that private 'Value Added Networks' ('VANs') would be set up.⁹ The Internet, if mentioned at all, was dismissed as being hopelessly insecure for business purposes, and really only of use as a plaything for academics. It is also true that the Internet is not, at least at first sight, particularly suitable as a medium for commercial dealings. Its traditions are almost militantly democratic (albeit somewhat elitist), and there is no central control, except as to the communication protocols to be used (see further below at sections 1.2.1, 1.3.1 and 1.3.3.1). Control is certainly not generally exercised over the content of information available, or the use to which the medium is put. There is no certainty as to who you are dealing with. There is also a tradition of freedom of information, 'copyleft' not copyright, even to the extent that computer operating systems are simply given away.¹⁰ It is not obviously a medium from which money can be made.

Yet the Internet is central to e-commerce today. The marriage of two apparently incompatible cultures is probably largely an accident of timing. Digital communications between computers became publicly accessible only with the development, around the mid-1990s, of the WWW and graphical browsers, such as Mosaic and Netscape. From the start, the WWW used the protocols then used on NSFNET,¹¹ the backbone of the Internet, funded ultimately by the American government. This was partly, no doubt, because NSFNET was by then a mature and high-capacity network, operating reliably, and connecting a wide range of people from all over the world. The WWW, no more than the Internet itself, however, was intended to be a vehicle for commerce.

To some extent, e-commerce has overcome the shortcomings of the Internet through technological means. Encryption and digital signatures, described in Chapter 5, allow parties to deal with each other, reasonably secure as to the identity of the other party. Information, even on the WWW, need not be free, but can be protected by password or other means. Reliable payment systems have been developed. By these means, the Internet has been moulded to suit the needs of commerce. Not everything can be resolved by technological means, however, and the law also has a role to play, as we will see.

8 Or Intranet or Extranet, to which the observations here also apply.

9 Eg, Emmelhainz, MA, *Electronic Data Interchange: A Total Management Guide*, 1990, New York: Van Nostrand Reinhold. VANs are described at pp 111 *et seq*. I can find no reference to the Internet at all.

10 See, eg, Naughton, J, *A Brief History of the Future: The Origins of the Internet*, 2000, London: Phoenix, Chapter 13.

11 National Science Foundation.